

CWP No.28758 of 2019(O&M)
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CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Mr. Sudhir Nar, Senior Panel Counsel
for the Union of India.

RAJ MOHAN SINGH, J.

[2]. Petitioner is a company established under Companies Act, 1956. Petitioner operates all across the country. Petitioner-Company is involved in broadcasting and media solutions and is a satellite channel distributing company in India. It has

diversified array of services. The company is the copyright owner of a large number of sound recordings of well known and established music labels like Zee Entertainment Enterprises Limited ("ZEE"), Eros International Media Limited ("Eros"), Tips Industries Limited ("TIPS"), Red Ribbon Entertainment Pvt. Ltd. ("Red Ribbon"), SPI Music Private Limited ("Think Music"), Third Culture Entertainment Pvt. Ltd. ("Nucleya") and authorised agent of Yash Raj Films Pvt. Ltd. ("YRF") for valuable considerations. The company has entered into agreements with the aforesaid companies in terms of existing provisions of Copyright Act, 1957. These agreements also confer public performance rights in sound recordings, which includes communication of sound recording to the public during live concerts/events including clubs, hotels, restaurants as well as live events and parties etc. Chapter III of the Copyright Act, 1957 deals with definition and meaning of copyright.

[3]. According to Section 14 of the Copyright Act, copyright means the exclusive right subject to the provisions of the Act, to do or authorize the doing of any of the acts mentioned therein, in which, Section 14(e) (iii) of the Act provides that in case of a sound recording, copyright under the Copyright Act, 1957 means the exclusive right to communicate the sound recording to the public.

[4]. According to the aforesaid provision, the owner of copyright in the sound recordings enjoys a number of rights and such rights are enumerated under different sub sections of Section 14 of the Act.

[5]. Communication to the public would mean making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies to it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available. In this regard, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

[6]. Sound recording means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is the method by which the sounds are produced.

[7]. Sound recording is one of the works, in which, copyright subsists. The assignment of copyright can be done by the owner of the copyright in an existing work or the prospective

owner of the copyright in a future work to any person and the assignee as regards the rights so assigned, shall be treated for the purposes of this Act as owner of the copyright and the provisions of the Act shall have effect accordingly. The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing or by his duly authorised agent. The copyright in a work shall be deemed to be infringed when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights or in contravention of the conditions of a licence does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright or permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright.

[8]. Section 52 of the Copyright Act deals with certain acts not to be infringement of copyright. Section 52(1)(za) of the Act is reproduced hereasunder:-

“(za) the performance of a literary, dramatic or musical work or the communication to the public of such work or of a sound recording in the course of any bona fide

religious ceremony or an official ceremony held by the Central Government or the State Government or any local authority.

Explanation.—For the purpose of this clause, religious ceremony including a marriage procession and other social festivities associated with a marriage.]”

[9]. Respondent No.2 has issued the public notice dated 27.08.2019, thereby not interpreting the provisions contained in Section 52(1)(za) of the Act to mean that the utilization of any sound recording in the course of religious ceremony including a marriage procession and other social festivities associated with a marriage, does not amount to infringement of copyrights and hence no licence is required to be obtained for the said purpose.

[10]. Feeling aggrieved against the interpretation given by respondent No.2, the present writ petition has been filed on the ground that respondent No.2 has no jurisdiction to embark upon the legislative domain. The interpretation, if any, to the codified law falls under judicial domain or by way of clarification and amendment under legislative domain. The question arises as to the requirement of obtaining a licence for playing sound recording in social functions organized during marriage. This issue is no more *res integra*.

[11]. In CWP No.7772 of 2011 titled M/s Phonographic Performance Limited Vs. State of Punjab decided on

27.07.2011, this Court has held that a sound reproduction by a DJ in a religious ceremony is surely a function that is connected to marriage. It is not as if a DJ's performance amounts to conducting the marriage. Marriage is definitely different from the functions connected to the marriage and the tariff regime applies to performance at such functions even if it has a religious overtone. Para No.8 of the order dated 27.07.2011 is reproduced hereasunder:-

"VI. Performance in marriage parties, whether included in the notification and controlled by tariff regime

8. To advert to the objection by the learned counsel appearing on behalf of 4th respondent that the categories specified in the Government gazette does not include a DJ performance in a marriage hall, it misses the wide expression made through as "event" which is "birthday and other functions in commercial premises". "Other functions" would mean just as well a pre-marriage, marriage or post marriage function. The learned counsel for the 4th respondent seeks to contend that a marriage function is a religious ceremony and cannot be understood as falling within other functions referred to as an event. We are not discussing the issue of a Prohit or a Moulvi or a Priest performing marriages or infringement of any of their religious functions or trenching upon their activities. We are discussing a situation where a reproduction of sound recording takes place and communicated to the public in the manner defined in Section 2(ff):

"communication to the public" means making any

work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation.- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.

It would make no difference, even if it were to take place in a religious ceremony. A sound reproduction by a DJ performing at such an event is surely a function that is connected to marriage. It is not as if a DJ's performance amounts to conducting the marriage. Marriage is definitely different from the functions connected to the marriage and the tariff regime applies to performances at such functions even if it has a religious overtone."

[12]. The Coordinate Bench ultimately held that the police machinery is relevant in so far as the violation of copyrights. The violations give rise to civil law remedies under Chapter XII of the Copyright Act through Section 53 to Section 62 of the Act and remedies through Criminal Courts by constituting the violations as offences under Chapter XIII through the provisions

commencing from Section 63 to Section 70 of the Act. Section 64 of the Copyright Act empowers the police to seize infringing copies. Section 66 of the Act empowers the Court to try any offence under the Act to direct that all copies of the work or of plays in the possession of the offenders to be delivered up to the owner of the copyright. Section 70 of the Act gives the power to a Judicial Magistrate 1st Class to try the offence under the Act. In view of aforesaid, there can be no doubt that the petitioner-Company is entitled to enforce the rights secured under the Act through both mechanisms like civil law as well as by setting criminal law in motion. The police machinery is bound to enforce the law, without requiring the petitioner to approach the Government for further directions, for every copyright violation when public performer in any event reproduces a sound recording without licence from the copyrights society.

[13]. The 'aforesaid propositions as noticed in M/s Phonographic Performance Limited case (supra) have been explained by the Division Bench of the Gujarat High Court in Special Civil Application No.9979 of 2009 titled Devendrakumar Ramchandra Dwivedi Vs. State of Gujarat and others decided on 24.09.2009, wherein Section 52(1)(za) of the Act has been explained by saying that Section 52(1) exempts a variety of limits on the rights of the copyright owner in

the form of compulsory licenses, complete exemptions from liability and other privileges such as fair or honest use. The provision of Section 52 of the Act referred to non-profit performances of music and other non-dramatic works. Basic thrust is to exempt live performances of such works when there is no commercial purpose and when there is no admission charge and are used exclusively for educational, religious or charitable purposes and not for any private financial gain. The fair use doctrine has been explained in para No.14 of the judgment, which reads as under:-

"14. Therefore, the main thrust of Section 52(1) of the Copyright Act, 1957 is to exempt live performance of such works when there is no commercial purpose and when there is no admission charge and/or when admission proceeds are used exclusively for educational, religious or charitable purpose and not for private personal financial gain. Above principle is generally called "fair or honest use doctrine" which constitutes the most significant limitation on the exclusive rights held by a copyright owner. 'Fair Use Doctrine' was first articulated by Justice Story in Folsom v. Marsh, 9F.Cas. 342 in the year 1841. Learned Judge, opined that quoting copyrighted material in the course of preparing a biography or a critical commentary might be excusable, but not if so much is taken, that the value of the

*original is sensibly diminished, or the labours of the original author are substantially to an injurious extent appropriated by another. Fair use doctrine has another object to achieve is to promote the progress of science and the useful arts. Fair use doctrine comes into play when a too literal enforcement of the copyright owner's rights would operate to the detriment of the public interest in access to and dissemination of knowledge, and unauthorized copying can be tolerated without significant economic injury to the copyright owner. Fair use doctrine is mixed question of law and facts and if the use is commercial rather than nonprofit, it is presumed to be unfair and to have a likely adverse impact on the market for the owners' work, the burden is on the organizers to prove otherwise. In **Sony Corporation of Americc v. Universal City Studios, 464 U.S. 417(1984)** the Court sustained a claim of fair use for home videotaping of copyrighted television programme – a use rather clearly falling outside the enumerated categories. In **Harpaer & Row Publisher v. Nation Enterprises, 471 U. S. 539, 560 (1985)** involving a news magazine's quotations from the to be published memories of President Ford relating to his pardon of President Nixon – a use falling rather clearly within the enumerated category of news reporting, the Court rejected the claim of fair use.”*

[14]. The question whether certain acts would fall within the exempted categories as enumerated under Section 52(1) of the Act has to be decided according to facts of each case. In view of aforesaid, there cannot be general interpretation to the provision as given in the impugned public notice/letter. The theory of presumed intention or fair use and infringement, public interest etc is to be judged on the material available in a given case. When the copyrights are exploited for the commercial purpose, the remedy lies under the Act itself i.e. both under civil as well criminal laws.

[15]. The impugned public notice/letter dated 27.08.2019 can be misused by certain notorious elements in order to enrich themselves by playing the sound recordings for commercial gains in commercial spaces after obtaining requisite authorization from the authority. The element of commercial gain cannot be ruled out from the interpretation as given by respondent No.2 to Section ⁵²54 of the Copyright Act, 1957. Respondent No.2 has no authority under the Act to clarify or interpret applicability of law in the manner as suggested in the impugned public notice/letter. The impugned public notice does not disclose the authority under which the same has been issued. The impugned public notice cannot override the provisions of Copyright Act and cannot take away the statutory

right of the petitioner under Section 55 of the Act to initiate civil proceedings in the Court of law for the infringement of Copyright Act, 1957. The impugned interpretation would give rise to a very enormous situation and in such eventuality, the police authorities may refuse to take cognizance of the offence of infringement of copyright, which may be an offence under Section 63 of the Act punishable therein. The impugned public notice is in contravention of the ratio laid down in M/s Phonographic Performance Limited case (supra).

[16]. The impugned public notice is also violative of the doctrine of separation of power as an attempt has been made by respondent No.2 to usurp the legislative power of enactment and judicial power of interpretation. The impugned public notice also infringes the right of the petitioner under Article 19(1)(g) of the Constitution of India and it overrules the provisions of copyright. The impugned public notice does not provide any such reasonable restrictions in the context of Article 19 of the Constitution of India. Even otherwise, those restrictions ought to be imposed through process of law to be enacted by the Parliament or the State Legislature as the case may be. Such restrictions cannot be imposed by means of executive restrictions and public notice seeking to explain or interpret the provisions of law without sanction and leave of the legislative

authorities. The public notice seeks to impinge upon the fundamental rights and protections granted by the Constitution of India and is violative of Articles 13 and 14 of the Constitution of India. The protections granted by the copyright Act are sought to be abridged by the public notice, which is unsustainable.

[17]. The defences submitted by respondents No.1 and 2 in the context of relief are not in public interest and the public notice only explained the existing provisions in terms of Section 52(1)(za) of the Copyright Act are totally fallacious for the reasons recorded hereinabove.

[18]. In view of above, the impugned public notice is quashed. This writ petition is allowed. Consequential action to follow.

[19]. All pending applications are disposed of accordingly.

सत्यमेव जयते

19.05.2022
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No